“Don’t Tread on Me”:
Insurance Companies, Immunities, and the U.S. Antitrust Laws

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Summary: U.S. Insurance Antitrust “Immunities” are being challenged again

The very nature of insurance involves collaboration. That is how risk is spread. But collaboration among competitors is suspect under U.S. antitrust laws. The proto-insurers who sat around at Lloyds’ coffee-shop four hundred years ago would probably not do that today without their antitrust lawyers on hand.

Because insurers need to collaborate just to create a socially-desirable product, antitrust immunities have developed.[1] Insurance companies in the United States enjoy two basic types of antitrust immunities: the State Action doctrine and the McCarran-Ferguson Act.[2] But both are becoming increasingly limited.

The state-action doctrine allows states to pre-empt federal antitrust laws and permit anti-competitive conduct in commercial actions within their jurisdiction. This could happen when, for example, a state might decide that some public policy interest (like protecting small businesses) is more than important than competition. But in the last year, the Federal Trade Commission won a challenge in the Supreme Court that made part of the state-action test harder to meet. And now, the Supreme Court has accepted another state-action case for its Fall 2014 term.

In contrast to state action, that can cover any industry, the McCarran-Ferguson exemption grants immunity to insurers from *federal* antitrust law — but *only* if there is some state regulation of insurance. But the McCarran-Ferguson Act has been threatened with repeal for the last seven years, with at least five bills now pending in Congress.

Both immunities are complex and not exactly intuitive. Unlike the EU block exemption, the U.S. immunities do not simply immunize certain kinds of conduct from antitrust liability. Instead, they merely shift the responsibility for antitrust regulation from federal antitrust enforcers to the individual states. In other words, the so-called antitrust “immunities” actually involve a balancing of conflicting Constitutional-level federal and state jurisdictions, a problem that does not exist in the UK.

In the United States, this balancing is called “federalism,” which is a real misnomer, because “federalism” is actually a euphemism for state’s rights. Generally speaking, state antitrust enforcement is sometimes seen as more lenient or sympathetic than federal enforcement. And, as we mentioned before, in some cases, states are simply willing to suspend federal competition laws for a variety of policy reasons. However, that does not mean that state officials are not prepared to enforce their antitrust laws in the context of their overall public policy. In fact, the most significant insurance antitrust cases over the last 20 years were brought by state enforcers.

If access to these antitrust immunities becomes more restricted, that still would not mean that insurance companies would necessarily have any antitrust liability for joint activities. For example, the pooling of resources is a joint-venture type of activity that would almost certainly be upheld as a legitimate, pro-competitive practice that adds consumer value to the economy. But, if someone challenged an agreement, the companies involved would have to

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[1] This doesn’t mean that insurers would have antitrust liability if immunities did not exist. For example, the pooling of resources is a joint-venture type of activity that would almost certainly be upheld as a legitimate, pro-competitive practice that adds consumer value to the economy. But if someone challenged it, the companies involved would have to justify their practices either by a motion for summary judgment or at a trial. The purpose of immunities is to avoid that stressful and wasteful litigation.

[2] There are other theories of antitrust immunity that could apply to insurers, but State Action and McCarran-Ferguson are the main grounds of protection for most.

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Let us take a closer look at the two forms of immunities that are widely used by the U.S. insurance industry.

The State-Action Immunity Doctrine

Briefly, the state-action doctrine allows the state, as a “sovereign,” to exempt competitive behavior from the federal antitrust laws under two conditions: the state must (1) clearly spell out the exemption; and (2) actively supervise the private parties acting under the exemption.

The state-action immunity is often used by insurers for pooling of risk information. And, in some cases, state insurance departments require joint activity in the submission of rates. From an antitrust point of view, any competitor exchange of cost or pricing information is risky. As a result, antitrust lawyers would normally counsel against those practices without some antitrust immunity

The state-action doctrine provides that immunity — providing the two conditions are met. As we shall see, these conditions are harder to meet than you might imagine.

The state-action doctrine is based on the U.S. Constitution, adopted in 1791. It assigned different (and, in theory, complementary) responsibilities to the federal and state governments, each of which are considered “sovereign” in their own realms. The Federal government has exclusive control over “interstate commerce,” and federal antitrust authority is based on the “Commerce Clause.”

The Supreme Court has held that the “Commerce Clause,” a Constitutional imperative, allows the federal government to displace state restrictions that affect interstate competition.[3] But it also held that the Sherman Act itself, a federal statute, applies only to private parties, and not to the “sovereign” states themselves.[4] This means, for example, that while private parties could never legally agree on prices on their own, the state can authorize them to do exactly that, if it “actively supervises” their activity.

The State Action doctrine allows the states, as “sovereigns,” to exempt the activity of private parties from the federal antitrust laws as long as their actions fall *within* state jurisdiction.[5] This is a simplification of an enormously compli-

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[3] In *Southern Motor Carriers Rate Conference v. United States,* 471 U.S. 48 (1985; internal citations omitted), the Supreme Court summed up its previous teaching on this subject:

> “The Court recognized that the State's program was anticompetitive, and it assumed that Congress, ‘in the exercise of its commerce power, could prohibit a state from maintaining such a stabilization program. . . .’ Nevertheless, the Court refused to find in the Sherman Act ‘an unexpressed purpose to nullify a state's control over its officers and agents . . . .’”

[4] The Supreme Court said, in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980), that the Sherman Act applied only to private parties and not the states:

> “The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The Act is applicable to ‘persons,’ including corporations (§7), and it authorizes suits under it by persons and corporations (§15). A state may maintain a suit for damages under it, *Georgia v. Evans*, 316 U. S. 159, but the United States may not, *United States v. Cooper Corp*., 312 U. S. 600 -- conclusions derived not from the literal meaning of the words ‘person’ and ‘corporation,’ but from the purpose, the subject matter, the context and the legislative history of the statute.”

[5] But state jurisdiction depends on whether the local actions affect interstate commerce. In *Gulf Oil Corp. v. Copp Paving*, 419 U.S. 186, 194-195 (1974), the Supreme Court said that the expanding scope of federal antitrust jurisdiction reflected the ever-expanding scope of the commerce clause so that "however local its immediate object, a 'con-

cated doctrine. The exempt activity has to relate to mainly intrastate commerce (though it can have a "material" effect on federally controlled interstate commerce[6]). In other words, a state would not be able to immunize activity that fell into interstate commerce. But, as the Supreme Court once observed, that "[i]t is fair to say that our cases have not been entirely clear" on this subject.[7]

The background of the state-action doctrine is intensely fascinating from an historical point of view. This includes the fact that the Supreme Court did not even consider "insurance" to be part of "interstate commerce" until 1944, when it suddenly reversed prior holdings, and held that insurers *were* subject to federal antitrust laws. For those interested in this history, please see Appendix 1.

State action immunity has typically been used to protect private activities from competition where the state has a "public policy" interest. For example, a state:

- might allow insurance companies to organize "rating bureaus" that would then establish uniform rates for their members;[8]
- might restrict price competition in the liquor trade to protect "Mom and Pop" stores from larger price-cutting competitors;[9]
- might let raisin producers petition a state board to restrict output and impose higher wholesale prices to "prevent economic waste in the marketing of agricultural crops;"[10]
- might let trucking companies agree to submit joint proposals of prices to state public service commissions to reduce the number of separate submissions and allow the commissions to operate more efficiently;[11]
- might let car dealers bar potentially competing dealerships in the same area.[12]

All these activities, conducted by private parties, would normally be violations of the antitrust laws. The state action doctrine allows a state to exempt them from the antitrust laws.

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tract, combination . . . or conspiracy' nonetheless may constitute a restraint within the meaning of [the Act] if it substantially and adversely affects interstate commerce." When the state acts "as sovereign," it can impose restraints on competition that "the Sherman Act did not undertake to prohibit." 317 U.S. 341, 352 (1943).

[6] In *Midcal*, 317 U.S. at 360, the Supreme Court wrote:

> "This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken. * * *
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> "there are many subjects and transactions of local concern, not themselves interstate commerce or a part of its operations, which are within the regulatory and taxing power of the states, so long as state action serves local ends and does not discriminate against the commerce, even though the exercise of those powers may materially affect it."

Those confused by this equivocal declaration get help from the excellent article by Robert P. Inman and Daniel L. Rubinfeld, "Making Sense of the Antitrust state-action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism," *Texas Law Review,* Volume 75, Number 6 (May 1997), p. 1204.

[7] 471 U.S. at 46.

[8] *FTC v. Ticor Title Ins. Co*., 504 U.S. 621 (1992). This case involved only alleged price fixing for the title searches and title examinations because, by law, the FTC has no jurisdiction over insurance itself.

[9] *Cal. Liquor Dealers v. Midcal Aluminum, Inc*., 445 U.S. 97, 102 and 112 (1980). For example, to this end, a state may also regulate opening and closing hours, possible days of operation, and prices.

[10] *Parker v. Brown*, 317 U.S. 341 (1943).

[11] *Southern Motor Carriers Rate Conf. v. U.S*., 471 U.S. 48 (1985).

[12] *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co*., 439 U. S. 96 (1978).

But there is a catch. Under the Supreme Court's decision in *Midcal*, the state action exemption is valid only if two conditions are met. The state

1. must clearly say that it intends to exempt the activity from the antitrust laws (the "clear articulation" test);[13] and

2. must "actively supervise" the activity of the private parties involved.[14]

These two rules seem very clear. But there are dozens of cases where the participants found out, after the fact, that one (or maybe even both) of the required elements had not been satisfied.[15] The failure to meet *both* parts of the test exposed the parties to antitrust litigation — exactly the opposite of what was supposed to happen.

Finally, we should note that federal courts instinctively dislike immunities. As the Supreme Court said:

> "given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, state-action immunity is disfavored, much as are repeals by implication."[16]

As a result, courts carefully and cynically scrutinize claims of any antitrust immunity.

Just to give one example, a few years ago, we defended a case brought against a segment of the insurance industry. It involved the joint preparation of proposed premium fees that were submitted to a state insurance department for approval, *as state law required*. A plaintiff's lawyer filed a class action in New York, claiming that (a) the proposed fees contained "fraudulent" components, and therefore (b) the state could never have "actively supervised" the fee approval process, because it never had the "true" facts. A virus of class actions erupted across the country, and spread to 15 other states. (In some, the copycat plaintiffs lawyers were so lazy, they even left in the New York law references, which made no sense in their own jurisdiction.) In fact, the claim of fraud was wrong. But there were also several different legal immunities that should have applied to protect those actions, including state action, the *Noerr-Pennington* doctrine, the filed-rate doctrine, and the McCarran-Ferguson immunity. And, eventually, all those immunities did result in the total dismissal of the cases. But the defense took three years, because courts were reluctant to apply immunities, and allowed the plaintiffs to replead their cases even after dismissal.

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[13] In last year's decision, *FTC v. Phoebe Putney Health System*, 568 U.S. __ (2013), the Supreme Court actually adopted a higher standard for "clear articulation," that requires that the sovereign "affirmatively contemplated" the anticompetitive behavior. 568 U.S. at 9 (slip opinion).

[14] *Midcal,* 445 U.S. at 105. State sub-entities, like agencies and municipalities, are not subject to the "active supervision" part of the test on the theory that,

> "unlike private parties, such entities are not subject to the "active state supervision requirement" because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies. *Hallie v. Eau Claire*, 471 U. S. 34, 46–47 (1985)."

As this is written, we are watching the "Christie-gate" scandal, where senior New Jersey government officials, reporting directly to the New Jersey governor, deliberately blocked lanes to the George Washington Bridge. Their motive was to retaliate against a New Jersey mayor who refused to endorse the New Jersey governor, and thereby strengthen his presidential ambitions in 2016. This type of incident is hardly unique, and one wonders how much longer this whimsical presumption of government good-faith will last.

[15] For example, the Court found that there was no "clear articulation" in *Goldfarb v. Virginia State Bar*," 421 U.S. 773 (1975), where the state bar association recommended anticompetitive fee schedules; and in *Cantor v. Detroit Edison Co*, 428 U.S. 579 (1976), where the local utility's program to provide free light bulbs to its customers (and thus displace competition in the light bulb market) had been incorporated into the utility's rates but had *not* been approved by the public ser5vice commission. The "active supervision" requirement failed in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980), where the state authorized resale price maintenance, but did not supervise or regulate the activities.

[16] *FTC v. Ticor Title Ins*., 504 U. S. 621, 636 (1992).

For this reason, we always try to counsel clients to act on the independent merits of any proposed action, rather than simply relying on an immunity.

Let us now turn to a review of the two elements of the state-action doctrine.

The Failure to "Clearly Articulate" (Part 1 of the State-Action Test)

In 2013, the Supreme Court decided the first state action case in 20 years. In that case, they dealt with part one of the test, the requirement that a state clearly show its intention to exempt the anti-competitive activity.

In *Federal Trade Commission v. Phoebe Putney Health System*,[17] the Supreme Court increased the burden that a defendant must meet to show that the State had really intended to displace competition.

Phoebe Putney involved a hospital merger which, the merger parties claimed, was immune from antitrust law because of a state-action exemption. A Georgia law had created special-purpose hospital authorities, and the law gave them general corporate powers to take certain types of actions. These included the authority "to provide a mechanism for the operation and maintenance of needed health care facilities in the several counties and municipalities of th[e] state," as well as the powers to "exercise public and essential governmental functions," "all the powers necessary or convenient to carry out and effectuate" the law's purposes, and the power "[t]o acquire by purchase, lease, or otherwise and to operate projects."

Phoebe Putney itself was a hospital owned by one of these hospital authorities. Phoebe Putney proposed to buy the only other major hospital in its county. If approved, the merger would have given the combined hospitals an 86% market share in the county. Relying on the enabling statutes, the authority approved the purchase.

The FTC challenged the merger. But it lost in both the District Court[18] and Eleventh Circuit[19], which held that, even though the transaction would lessen competition, or even create a monopoly, the acquisition was exempt from antitrust scrutiny. This, the courts said, was because the "impressive breadth" of the statutory powers showed that the anticompetitive effects were a "foreseeable result" of the Georgia enabling statute. In fact, general "foreseeability" was the way many understood the test to be defined.

The Supreme Court reversed. Looking at the first part of the state-action test ("clear articulation"), it found that the enabling statutes were inadequate to show that the state had intended to displace competition. The Court agreed that the test did not require an "express" statement authorizing the anti-competitive activity. And it repeated that earlier decisions had required only that the anticompetitive effects were a "foreseeable result" of the state's authorizing law.[20]

But in *Phoebe Putney*, the Supreme Court imposed what is now seen to be a higher threshold. It held that the state-action defence failed because "there is no evidence the State *affirmatively contemplated* that hospital authorities would displace competition by consolidating hospital ownership:"[21]

> "Our case law makes clear that state-law authority to act is insufficient to establish state-action immunity; the substate governmental entity must also show that it has been delegated authority to act or regulate anticompetitively."[22]

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[17] 568 U.S. ___ (2013). The case was decided February 19, 2013, and available at www.supremecourt.gov/opinions/12pdf/11-1160_1824.pdf. Official page numbers will not be available until the volume is complete. The page numbers we cite in this article refer to the pamphlet printing.
[18] 793 F. Supp. 2d 1356 (2011).
[19] 663 F. 3d 1369 (2011).
[20] 568 U.S. at p. 8 of the pamphlet printing.
[21] 568 U.S. at p. 9 (my emphasis).
[22] 568 U.S. pp. 9-10.

Despite the broad powers given to the hospital authority, the Court concluded that there was no authority "to act or regulate anticompetitively." In fact, the Court observed that only a relatively small proportion of the powers delegated by the State to the hospital authority had the ability to reduce competition at all. As a result, the Court concluded "this is too slender a reed" to rely on for "clear articulation" of an intention to authorize anti-competitive behavior and create antitrust immunity. The Court summed up, saying, "'simple permission to play in a market' does not 'foreseeably entail permission to roughhouse in that market unlawfully.'"

As a practical matter, this means that, in the future, parties who want to rely on this immunity will have to confirm for themselves that the statutes permit anti-competitive behavior. Relying on general delegations of powers, or even on assurances by the state, is simply not enough to protect the client.

The Failure to "Actively Supervise" (Part 1I of the State-Action Test)

One of the leading cases on the failure of part II of the state-action immunity involved insurance.[23] *FTC v. Ticor Title*, 504 U.S. 621(1992), is a great example of a failure to verify the "active supervision" part of the test.

In *Ticor,* title insurance industry members used rating bureaus to set joint rates and file them with the states. The insurers relied on the state-action doctrine, citing state authorization for the rating bureau activity *and* the states' power to review rate filings that were made. So there was no question that this joint activity was supervised by the state.

But in fact, many of the filings were "inertia" filings. They became effectively automatically after the passage of time *unless* the state insurance regulator failed to veto them. (This process was called the "negative option.") Obviously, without immunity, competitors agreeing on any mechanism of price fixing would normally be a *per se* antitrust violation.[24]

The court in *Ticor* found that most of the states did absolutely nothing to supervise the rating bureaus. Some checked the filings for mathematical accuracy — but others did not.[25] States were authorized to review rates at public hearings — but most never even bothered.[26] One state announced a "comprehensive" review of its rating bureau — but never conducted it. Another did ask the rating bureau for more information — but let seven years go by before it got the information (and, in the meantime, the higher filed rate was in effect). One state insurance department asked the rating bureau to justify the new, higher rates — but approved the rate increase even though it never got the answer.[27]

Based on the failure to actively supervise, the Supreme Court found that no antitrust immunity from federal law existed. You should note that both the states *and* the parties involved both believed that the states *had* immunized the conduct. But they were wrong, and their error exposed the insurers to antitrust liability. There have been many other decisions involving similar failures.

The case that is now headed for the Supreme Court in 2014 offers an interesting variation on the "active supervision" component (and also illustrates the growing intensity of the states' rights movement in the U.S.). The case involves a state dental board, a North Carolina state agency, whose members are practicing dentists elected directly to the state board by other practicing dentists. The case centers around teeth whitening services, a service that had been offered in North Carolina by dentists and non-dentists.

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[23] The case involved insurance but the decision was actually limited to non-insurance areas of title insurance, because the McCarran-Ferguson Act transferred jurisdiction over insurance to the States.
[24] In *United States v. Socony-Vacuum Oil Co*., 310 U.S. 150, 223 (1940), the Supreme Court explained that:

> "Under the Sherman Act, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se."

[25] 504 U.S. at 638.
[26] 504 U.S. at 629.
[27] 504 U.S. at 629.

The state board decided that non-dentist teeth whitening services amounted to the "practice of dentistry" without a license and succeeded in totally excluding the non-dentist class of competitors, whose prices were significantly lower. The board defended their actions on the ground that it was a "state agency" and therefore "sovereign." They argued that the fact that they were elected directly to the board by practicing dentists was irrelevant to their now-sovereign status, and they also argued that there could be no "conflict of interest" or possibility of "self interest," because, as a state agency, the board members were shrouded with the mantle of the sovereign and, as a "sovereign," no longer had any personal interests that could be considered.

As a result, the board claimed, it was completely exempt from the Sherman Act (because its actions were really those of the state), and, in any event, it certainly should not be subject to the "active supervision" requirement. The FTC sued and won, with the Fourth Circuit Court of Appeals holding that

> "we agree with the FTC that, as here, when a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor. Accordingly, it is required to satisfy both *Midcal* prongs to obtain the *Parker* exemption."[28]

On appeal to the Supreme Court of the United States, the dental board's appeal has drawn massive partisan support for "hybrid" state agencies. (A "hybrid" agency is a state entity staffed, at least in part, by private parties who could have a personal interest in the outcome of their "regulatory" activities.)The American Dental Association, the American Medical Association, state bars, and endless "hybrid" agencies all submitted supporting briefs, arguing that the "FTC has radically departed from 70 years of settled antitrust law,"[29] launched a "perverse"[30] attack on the Constitution, "grossly disrespects" the sovereignty of state's rights,[31] and undermines the integrity of carefully formulated state programs to protect consumers.[32]

One of the more good-humored *amici* compares the FTC's efforts to "increase its sphere of regulatory influence" over state economies with "Russia's historical efforts to acquire a warm water port — repeated and persistent."[33] The case should be argued during the Fall 2014 term.

The lesson here is that anyone who relies on the state-action doctrine for antitrust immunity needs to *independently* make sure that there is (1) "clear articulation" of the anticompetitive activity; and (2) "active supervision" of the activity by the state. You should never assume that these tests are satisfied just because some statute authorizes the activity, and because some state agency receives reports. You should also never rely on a trade group for assurances that these two tests are met. You need to check for yourself and consider whether there is any weakness in the immunity chain.

The McCarran-Ferguson Exemption

The McCarran-Ferguson exemption is something like the EU block exemption — if you squint a bit. But the EU block exemption gives a clear pass to specific behavior. By contrast, the McCarran-Ferguson act simply transfers antitrust enforcement for the insurance industry from federal to state governments. There is intermittent pressure in the U.S. to repeal part or all of the McCarran-Ferguson Act.

McCarran-Ferguson's history is rather strange, because — even though it's hard to believe — it is based on conflicting views of whether insurance is actually "commerce," and can therefore be regulated by the federal government under the Commerce Clause of the U.S. Constitution. The McCarran-Ferguson Act was passed in 1945, in response

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[28] *North Carolina State Board of Dental Examiners, v. Federal Trade Commission*, 717 F.3d 359 (4th Cir. 2013).
[29] North Carolina State Board of Dental Examiners v. FTC, No. 13-534, Petition For Writ of Certiorari at 10 (Oct. 25, 2013).
[30] *North Carolina State Board of Dental Examiners v. FTC,* No. 13-534, Brief of the American Dental Association at 5, (Nov. 27, 2013).
[31] *North Carolina State Board of Dental Examiners* Brief at 17.
[32] National Council of Examiners for Engineering and Surveying Brief at 2.
[33] California Optometric Association Brief at 2.

to a Supreme Court decision in *United States v. South-Eastern Underwriters*, 322 U.S. 533 (1944), that held that insurance *was* interstate commerce and *was* subject to federal law. For those interested in history, we relate this strange story in Appendix II.

The McCarran-Ferguson Act has four features:

- *First,* it allows individual states to regulate insurance.
- *Second,* it effectively exempts insurance companies from federal antitrust laws *as long as* a state regulates insurance.
- *Third,* the exemption applies only to the "business of insurance." This means the insurer's business actions that *relate directly to the transfer of risk*. It does not apply to other businesses that insurance companies may operate.
- *Fourth,* in a nod to the egregious facts in *United States v. South-Eastern Underwriters*, the exemption does *not* apply to actions that constituted "boycott, coercion, or intimidation."

A former head of the Antitrust Division of the Department of Justice once explained that the McCarran-Ferguson Act was intended to "return the legal climate to that which existed prior to *South-Eastern Underwriters* by specifically delegating to the states the authority to continue to regulate and tax the business of insurance."[34] But, obviously, in the *South-Eastern Underwriters* case, the states involved had simply allowed the monopolistic conspiracy to exist and grow in power. They did not "regulate" anything.

As we explain later, the effect of McCarran-Ferguson is to displace federal antitrust laws. But every one of the states have their own antitrust laws, which certainly prohibit major offences like price fixing or conspiracies to refuse to deal, and insurance companies are fully subject to those. And most states have insurance regulations that also prohibit major types of anti-competitive behavior.

Calls for McCarran-Ferguson Repeal

Since the 1960s, there have been ongoing calls for McCarran-Ferguson repeal in every decade. So far, none have succeeded. The current wave of repeal started in 2007. What is amusing is that it began as the personally-sponsored legislation of a U.S. senator who was outraged when his *own* insurance claims were denied.

Senator Trent Lott, a Mississippi republican, was considered for decades the Senate shill for the insurance industry. Lott began as an insurance defense lawyer. When he moved into politics, the insurance industry became his single biggest financial backer. Lott and the insurance industry loved each other. But all this changed when Hurricane Katrina destroyed one of his homes and his insurance company denied coverage. (His policy covered only wind damage, not flood damage.)

Lott instantly became what *Bloomberg News* called the "industry's number 1 critic," and declared, "I'm like a woman scorned."[35] Congreve was obviously right.[36] Lott used his Congressional influence to get back at his former love, the insurance industry. In 2007, Lott campaigned to repeal the Act. He was reported as saying, "the reason we need to repeal it is because the industry opposes it."[37]

In response, the National Association of Insurance Commissioners *opposed* repeal. (The NAIC is a trade association

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[34] Statement of Christine A. Varney at the United States Senate Hearing on "Prohibiting Price Fixing and Other Anticompetitive Conduct in the Health Insurance Industry," October 14, 2009.
[35] Brian Faler, "Lott, 'Scorned' After Katrina, Targets State Farm, Allstate," *Bloomberg News,* May 20, 2007. Available at http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aYjjIGyPeitA
[36] William Congreve, *The Mourning Bride* (1697): "Heaven has no rage like love to hatred turned / Nor hell a fury like a woman scorned."
[37] http://m.pianet.com/issues-of-focus/modernization/2007/lott-renews-call-for-mc-carran-repeal-in-senate-hearing

of the 50 state-appointed insurance commissioners who run the country's state insurance departments.) An NAIC representative testified in Congress in 2007 that

> "[c]ertain insurance practices, which are in place to help consumers and promote competitive and strong markets, are at risk if the Act is repealed."[38]

The insurance industry charged that "[t]his is a back-door attempt to bring about a federal takeover of insurance regulation."[39]

Of course, calls for McCarran-Ferguson repeal were coupled with calls for a *federal* insurance commission. Cynics might argue that McCarran-Ferguson repeal would have put 50 state commissioners out of their jobs (or at least whittled down their jurisdiction). The American Bar Association also supported repeal. But the same cynics might argue that the ABA is a trade association of trial attorneys that believes the public interest is best represented by more litigation. In any event, attempts at repeal failed in in 2007.

Other attempts at repeal failed in 2010[40] and 2012.[41] In April 2013, a respected antitrust lawyer and former FTC policy director argued that repeal was necessary because, with "oversight authority of the industry . . . essentially . . . left to the states, it is subject to virtually no consumer protection enforcement, except in the few states like California, New York, and Florida that have very active insurance regulators and antitrust enforcers."[42]

By September 2013, there were five bills introduced for repeal, some of them restricted repeal only to health insurance.[43] In a press release dramatically titled, "Bill to Strip Insurance Anti-Trust Immunity,"[44] the sponsors of one bill declared:

> "Right now, it is legal under federal law for insurance companies to collude to drive up prices, limit competition, conspire to underpay doctors and hospitals, and price gouge consumers. We must address the rapidly escalating cost of health insurance premiums, and this bill is a great first step."[45]

So far, no bill is close to being passed.

Exactly what is the McCarran-Ferguson exemption actually worth?

In fact, not that much. Some insurance clients, including some of our international clients, habitually tell us that "we're exempt from antitrust laws." That clearly is just not true.

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[38] http://www.naic.org/Releases/2007_docs/voss_mccarran_ferguson_testimony.htm

[39] Statement of the National Association of Professional Insurance Agents, quoted in "PIA Will Oppose Bill to Repeal McCarran-Ferguson Antitrust Exemption," PR Newswire, February 21, 2012, available at http://www.prnewswire.com/news-releases/pia-will-oppose-bill-to-repeal-mccarran-ferguson-antitrust-exemption-5-8044367.html

[40] In 2010, the House voted 406-19 on a bill to repeal McCarran-Ferguson. That bill never reached a Senate vote.

[41] Opponents of McCarran-Ferguson attempted another repeal, that was attached to a bill that would have dismantled the Independent Payment Advisory Board, a pricing advisory panel that is part of the new "Obamacare" health reform. That bill died. The repeal amendment was part of H.R. 5, the "Protecting Access to Healthcare Act," which was designed to limit patients' rights to sue for malpractice, and passed the House of Representatives on party lines, 223 to 181. The House Committee restricted the repeal to health insurers, but would have preserved McCarran-Ferguson protection for P&C and other non-health lines. The Senate took no action, so the bill never became law.

[42] David Balto, "Repeal McCarran-Ferguson — Before it's too late," April 8, 2013, available at "The Hill" website http://thehill.com/blogs/congress-blog/economy-a-budget/292405-repeal-mccarran-ferguson-before-its-too-late

[43] As of Fall 2013, the pending House of Representative bills were H.R. 99, 344, 743, 911, and 3121.

[44] http://www.defazio.house.gov/index.php?option=com_content&view=article&id=706:defazio-slaughter-revive-bill-to-strip-insurance-anti-trust-immunity-&catid=63:2011-news

[45] http://www.louise.house.gov/index.php?option=com_content&task=view&id=2844&Itemid=100072

As we mentioned before, McCarran-Ferguson guarantees an exemption only from *federal* antitrust law. But each of the 50 states has its own antitrust laws, along with 50 state insurance laws that often deal specifically with antitrust issues. Many of the 50 state attorneys general or 50 insurance commissioners (all political offices) are perfectly happy to bring antitrust or competition claims against insurers, especially when the headlines are good. In fact, the most vigorous antitrust case ever brought against the insurance industry was the "bid-rigging" case sponsored by the headline-scrounging, self-styled "Mr. Clean," New York Attorney General Eliot Spitzer. The publicity from that case propelled him into the governor's mansion (and also into newspaper headlines and infamy when, as "Client 9," he got caught with prostitutes almost as young as his daughter[46]).

But, for whatever reason, there is at least some antitrust enforcement in every state. In New York, for example, the current state insurance department enforcement is so aggressive in so many different areas (including antitrust, offshore reinsurance, and capital requirements) that federal enforcers complain that the head of the insurance department is treading on their jurisdiction. (As an aside, he is expected to run for attorney general in the next election.)

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If only one theme comes across from this article, it should be "act with extreme caution." The insurance industry is not popular in the United States. It is protected by limited immunities. But almost every one of its competitive activities can be attacked under some form of state law. Any collaborations among competitors can be mischaracterized as "anti-competitive," and there are popular forces that are always ready to smear the insurance industry. Act with extreme caution.

APPENDIX

The Antitrust immunities we discussed in this article are the result of a very complex balancing of conflicting federal and state jurisdictions. How these developed is a very interesting story and we offer it here purely for the historically minded.

US Constitutional Law: Federalism and States' Rights

In contrast to the UK, the United States has one federal and 50 state governments. The Constitution (1789) gave different powers to each. And, under the Tenth Amendment (which was part of the 1791Bill of Rights), the "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The Tenth Amendment was a bit of a cop-out, and highly criticized at the time. Alexander Hamilton, for example, wrote in 1788 that a loosely-structured confederation "would place us in a situation to be alternate friends and enemies of each other."[47] He was right. If anything, there is increasing friction between the federal and state governments, reaching a peak in 2012, when 26 states (out of 50) challenged the constitutionality of the federal health insurance law.[48]

The Constitution does not mention insurance. But one of the powers granted to the federal government was control over commerce. The "Commerce Clause" of the U.S. Constitution reads (in part) that

> "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."[1]

For 35 years after the Constitution was adopted in 1789, many people believed that the federal and date governments

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[46] *The New York Times,* March 11, 2008, available at http://www.nytimes.com/2008/03/11/nyregion/11night.html?_r=0

[47] *The Federalist*, No. 15, at 109 (Alexander Hamilton).

[48] I discussed this lawsuit in two earlier articles, "U.S. Healthcare Reform," *Journal of the British Insurance Law Association* (March 2012), and "Broccoli and U.S. Healthcare Insurance Legislation: The Constitutional Conundrum," *Journal of the British Insurance Law Association* (November 2012).

had concurrent jurisdiction over commerce within state borders. But John Marshall (1755-1835), fourth Chief Justice of the United States, changed this balance by expanding the powers of the federal government when interstate commerce was involved.

In fact, Marshall, a dedicated federalist, effectively rewrote the Constitution in four ways. *First,* he vastly increased the jurisdiction of the Supreme Court by creating the doctrine of judicial review (which allowed the Court to override laws of Congress). *Second*, he expanded the implied powers of the federal government to allow it to operate effectively. *Third,* he created the doctrine of federal supremacy over state laws that conflicted with federal law. And, *fourth,* in *Gibbon v. Ogden*, 22 U.S. at 194 (1824), he expanded the concept of interstate commerce, which is the basis of federal antitrust supremacy.

Gibbon v. Ogden involved two American legends: Robert Fulton, the inventor of the first practical steamboat, and his business partner, Robert R. Livingston, one of the committee of five appointed to draft the Declaration of Independence.

In 1808, the State of New York granted Fulton and Livingston a steamboat monopoly over all the navigable waters in New York. They assigned that right to Aaron Ogden. Meanwhile, a gentleman named Thomas Gibbons obtained a federal license to operate a steamboat under a 1793 federal law that regulated coastal waters.[1]

Ogden (who had a state license) sued Gibbons (who had a federal license). Ogden asked for, and got, a permanent injunction. He claimed, and the trial court agreed, that states had concurrent power with the federal government over interstate commerce. As a result, he said, his monopoly to carry steamboat passengers within New York was exclusive.

Gibbons (the federal licensee) appealed — and won. Chief Justice Marshall delivered a decision that expanded the known scope of commerce beyond mere traffic to a system of commerce:

> "Commerce, undoubtedly is traffic, but it is something more—it is intercourse . . . a power to regulate navigation is as expressly granted, as if that term had been added to the word 'commerce' . . . .[T]he power of Congress does not stop at the jurisdictional lines of the several states. It would be a very useless power if it could not pass those lines."

And, analyzing the words "commerce among the several States," found in the Commerce Clause, Marshall wrote, 22 U.S. at 197:

> "If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, *the power over commerce . . . among the several States, is vested in Congress as absolutely as it would be in a single government . . . .*"

This decision established the principle that the federal government had exclusive jurisdiction over activities that took place wholly within a state, as long as they affected interstate commerce. As the Supreme Court expressed it 150 years later, in *Parker v. Brown*, 317 U. S. 341, 351 (1943):

> "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."[49]

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[49] The Court added, 317 U.S. at 351, that:

> "In a dual system of government in which, under the Constitution, the states are sovereign save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

This decision was the basis for the State Action doctrine.

Insurance and Antitrust Immunity

The background starts in 1869 with the Supreme Court's decision in *Paul v. Virginia*, 8 Wall. 168, 75 U. S. 183 (1869). Samuel Paul, a resident of Virginia, wanted to represent a group of New York insurance companies in Virginia. He applied for a license and agreed to abide by all the local insurance regulations *except* that he refused to post a bond with the state treasurer. (The bond requirement applied only to non-Virginia insurers.) Virginia denied his license. But Paul went ahead and issued insurance policies for the New York companies anyway. He was indicted and convicted.

On appeal, Paul offered a defense that the federal government regulated interstate commerce. As a result, he claimed, Virginia's regulation trampled on federal jurisdiction. He lost. The Supreme Court concluded with a bizarre theory:

> "Issuing a policy of insurance is not a transaction of commerce. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. "[50]

In 1895, in *Hooper v. California*, 155 U. S. 648, 155 U. S. 654 at 655, the Court again declared flatly that "[t]he business of insurance is not commerce."[51]

Insurance companies naturally relied on this doctrine. Some of them relied on it to ridiculous extremes. *United States v. South-Eastern Underwriters*, 322 U.S. 533 (1944) involved a criminal conspiracy where a group of 200 fire insurance companies controlled 90% of the fire insurance market in the southern United States. They kept their profits high by fixing prices, and using coercion and intimidation to preserve their monopoly.[52]

When they were indicted, the association members argued that the federal antitrust laws didn't apply to them, and that Congress and the Supreme Court had recognized that immunity for decades.

Imagine everyone's surprise, then, when the Supreme Court reversed itself; held that interstate insurance does indeed fall within the Commerce Clause of the U.S. Constitution; and, for that reason, is subject to federal law, including the federal antitrust laws.

How could this happen? In what looks like a sudden epiphany, the Supreme Court apparently divined the real meaning of the 120-year-old language of Chief Justice John Marshall in the 1824 decision of *Gibbon v. Ogden*, 9 Wheat. 1, 22 U. S. 189. In that case, Marshall had held that

> "the power over commerce . . . among the several States, is vested in Congress as absolutely as it would be in a single government . . . ."

Applying that principle in 1944, the Supreme Court concluded that federal law (and federal antitrust laws) did indeed apply to insurance. It said, 322 U.S. at 561:

> "Whether competition is a good thing for the insurance business is not for us to consider. Having power to enact the Sherman Act, Congress did so; if exceptions

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[50] 75 U.S. at 183.

[51] One reason — thought not a very good one — advanced for this rule was that insurance policies "are not commodities to be shipped or forwarded from one State to another." But, as the Court pointed out in *South-Eastern Underwriters*, 322 U.S. at 546, Interstate Commerce also covered intangible property.

[52] 322 U.S. at 534.

> are to be written into the Act, they must come from the Congress, not this Court."

The following year (1945), Congress did exactly that. It passed the McCarran-Ferguson Act.